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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-5140

MICHAEL J. CASSIUS,

Petitioner,

v.

STATE OF ARIZONA,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT
OF THE STATE OF ARIZONA

BRIEF FOR THE RESPONDENT

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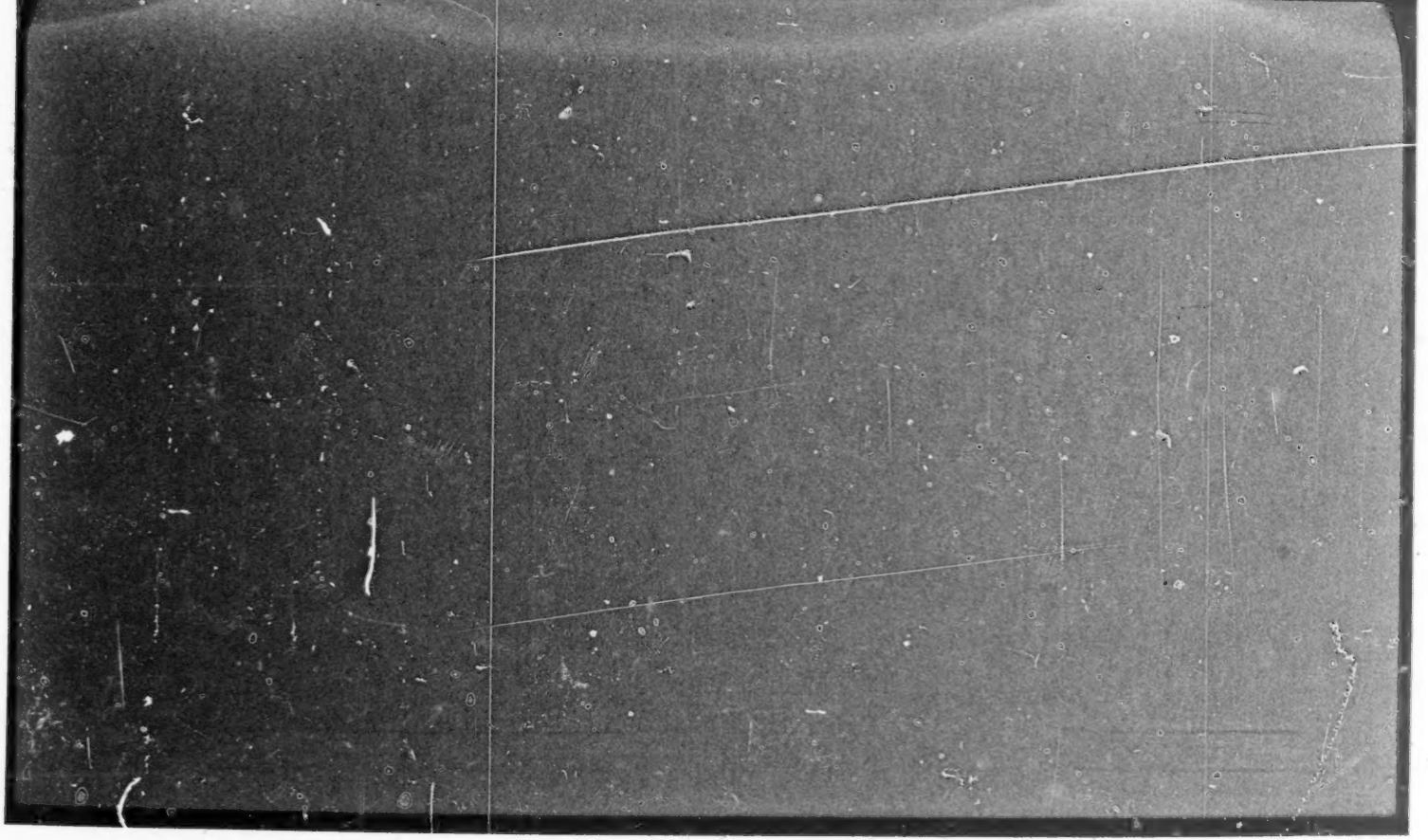

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BRIEF FOR THE RESPONDENT

SUMMARY OF ARGUMENTS

I.

DOUBLE JEOPARDY

Although there are a number of tests

for determining if offenses are the same within the double jeopardy protection of the Fifth Amendment, the one generally employed in multiple punishment situations is the "same evidence" test. Under this test if each offense requires proof that the other does not, they are not the same and a person convicted of and punished for both has not twice been placed in jeopardy. Convicting petitioner of burglary (A.R.S. §13-302) required proof of those facts comprising the burglary. His conviction of having been convicted of a felony while on bail (A.R.S. §13-1580) required proof, not of the acts comprising the burglary, but of the conviction of the burglary plus petitioner's bail status. The two do not require the "same evidence" and thus are not the same. The "same transaction" test is ordinarily applicable to multiple prosecution situations, not multiple punishments. But even if it

were applied here, a different result would not obtain for it has been said to except situations of multiple punishments at one trial and situations where the second offense is not fully consummated until the first has been completed.

In many ways a conviction of A.R.S. §13-1580 is similar to enhanced punishment under a recidivist statute which statutes have been upheld by this Court as constitutional.

Finally, although petitioner's being on his own recognizance at the time of his second burglary may be termed a status, his conviction of acts while in that status did not amount to an unconstitutional infringement analogous to that condemned in Robinson v. California, 370 U.S. 660 (1962).

II.

EQUAL PROTECTION

The reasonable condition imposed on

the right to bail by 1580 that a person released must obey the law does not infringe or chill the exercise of the right to bail. Thus, examination of 1580 should be made under the "rational basis" equal protection test of the Fourteenth Amendment.

Under the rational basis test, it is reasonable to impose a condition that a person released pending trial not violate any laws, because as a defendant's convictions accumulate his motive to not appear increases. Since the purpose of bail is to secure appearance at trial, 1580 is therefore rationally related to that purpose.

1580 does not violate the equal protection clause because it does not penalize a person for exercising his right to bail, but merely requires that a defendant not violate any laws and thus penalizes violation of the law and his conditional pre-trial release. Thus, although Arizona

does not make failure to appear a separate offense like most states, 1580 is analogous to such provisions.

The presumption of innocence is unaffected by 1580 because: (1) a defendant must be convicted beyond a reasonable doubt before he is punished under 1580; and, (2) bail is not automatically forfeited under 1580 but a hearing and high standard must be met before bail is revoked. This procedure is consonant with the rules that the right to bail is not absolute and that bail can be withdrawn completely for certain offenses. Also, imposing restrictions on a person under indictment has been upheld under the federal code.

Finally, even if the "compelling state interest" test must determine the constitutionality of 1580, the provisions of that section do not violate equal protection: (1) the compelling state interest test is a matter of degree;

(2) absolute mathematical asymmetry is not required to meet this test; and, (3) 1580 satisfies the compelling state interest test as refined by this Court because it serves a legitimate state interest and has a substantial relationship to the purpose of pre-trial release statutes and rules.

ARGUMENTS

I.

Immediately after pleading guilty to burglary, the first count of a two-count indictment, petitioner went to trial on the second count which charged him with committing and having been convicted of the burglary in Count One while released on his own recognizance on yet another, second burglary charge. By stipulation, he was tried before a judge without a jury, found guilty on the basis of the stipulation and given a sentence (one to three years) consecutive to that given on the burglary (one to two years). It is this consecutive sentence which petitioner argues punished him twice for the same offense, placing him twice in jeopardy.

The Fifth Amendment prohibition against twice putting a person in jeopardy provides at least three different types of

protection. It bars retrial for the same offense after acquittal [United States v. Ball, 163 U.S. 662 (1896); Green v. United States, 355 U.S. 184 (1957)]; retrial for the same offense after conviction [In re Nielsen, 131 U.S. 176 (1889)] and multiple punishment for the same offense [North Carolina v. Pearce, 395 U.S. 711 (1969); United States v. Benz, 282 U.S. 304 (1931); Ex Parte Lange, 18 Wall. 163 (1874)].

Common to all is one element -- the same offense. If the offense is the same, a person may not be retried after conviction or acquittal and he may not be punished a second time.[1]

Although a number of tests have been employed to deal with the same offense

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[1] Petitioner does not here and has never before complained that he has been put to trial twice for the same offense. He has complained only that he has been punished twice.

problem, it appears as though courts in general have narrowed the field to two.[2]

One is the "same transaction" test. This test focuses upon the criminal act or intent and all offenses committed by the defendant arising out of the same transaction or episode must be charged and tried at the same time. Thus, multiple prosecutions are prohibited where they emanate from a single transaction. Illustrative are Spannell v. Texas, 83 Tex.Crim. 418, 203 S.W. 357 (1918) and State v. Mowser, 92 N.J.L. 474, 106 A. 416 (1919). See Hoag v. New Jersey, 356 U.S. 464, 473 (1958) (Warren, C. J., dissenting); Ashe v. Swenson, 397 U.S. 436, 448 (1970) (Brennan, J., concurring); Ballerini v. Aderholt

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[2] 7 Brooklyn L. Rev. 79; 11 Stan.L. Rev. 735; 75 Yale L.J. 262; 5 Yale L.J. 339; 58 Yale L.J. 513; 57 Yale L.J. 132.

(5th Cir., 1930) 44 F.2d 352.[3]

The other, more widely used, test is the "same evidence", "identity of offenses" or "distinct fact" test. Here offenses are the same if the evidence required to support a conviction upon one of them would have been sufficient to warrant a conviction upon the other. Or, to put it another way:

> "[W]here the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one, is whether each provision requires proof of an additional fact which the other does not." Blockburger v. United States, 284 U.S. 299, 304 (1932).[4]

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[3] Later disapproved by Blockburger v. United States, 284 U.S. 299, 304 (1932), in multiple punishment situations. Discussed in Respondent's Brief, infra at 23.

[4] Albrecht v. United States, 273 U.S. 1 (1927); Morgan v. Devine, 237 U.S. 632 (1915); Ebeling v. Morgan, 237 U.S. 625 (1915); Burton v. United States, 202 U.S.

In Blockburger, this Court found two separate offenses from one sale of narcotics which violated two federal statutes, one prohibiting sales except from the original stamped package, the other forbidding a sale not in pursuance of a written order from the buyer. Although there was but one sale, this Court noted that each of the violated statutes required proof of a different element and there were, therefore, two offenses committed.

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344 (1915); Gavieres v. United States, 220 U.S. 338 (1911); Carter v. McClaughry, 183 U.S. 365 (1902). Gavieres and Ebeling present different factual and procedural situations that detract from their usefulness here. Gavieres concerned two trials, each under a different statute describing a different offense but both stemming from the same act. Ebeling concerned one trial for the tearing open of a number of different mailbags during one episode. Policy considerations might well dictate the choice of a different test for the sameness of offenses where there are two trials or two different mailbags. See Ashe v. Swenson, 397 U.S. 436 (1970) (Brennan, J., concurring); 11 Stan.L. Rev. 735.

Burglary, which in Arizona consists of an entry coupled with an illegal intent, is quite different from A.R.S. §13-1580 and each, in fact, does require proof of a different fact or element. Unlike burglary, 1580 requires (1) proof of conviction of a felony (not necessarily a burglary) and (2) proof that that felony was committed while the defendant was released on bail or on his own recognizance. Burglary may be proved without any evidence of the defendant's bail status and 1580 may be proved without any evidence of the facts constituting the act of burglary. The two offenses are simply not the same; the trial of each requires different evidence, each does have at least one element that the other does not and each was obviously designed to protect a different state interest.

Here, too, there is an additional factor that was not present in Blockburger

giving more strength to respondent's argument. Once the sale was completed in Blockburger, the crimes, all three, were also complete; there was nothing left to be done for them to ripen into an offense. That is not true here for the completion of the acts constituting the burglary did not complete all of the necessary acts for a conviction under 1580. Before the burglary could ripen into a fully completed 1580 offense, there had to be a conviction on the burglary. Without that conviction, there could be no conviction under 1580. In a very real sense, then, these two offenses could never be the same because one cannot occur until there is a conviction on the other.

How, then, as petitioner argues, can the state charge him with both at the same time before there is a conviction on one for until there is, the second crime has not been committed? First, it should

be noted that this issue was never raised in the state courts and should not be passed upon by this Court at this point. Tacon v. Arizona, 410 U.S. 351 (1973). Beyond that, the answer lies in an analogy to the enhanced punishment statutes.[5] Such statutes have been upheld by this Court against double jeopardy attacks even where the enhancing process is a different, even subsequent procedure to the trial which triggers it. Graham v. West Virginia, 224 U.S. 616 (1912); McDonald v. Massachusetts, 180 U.S. 311 (1901); Moore v. Missouri, 159 U.S. 673 (1895). True, this analogy breaks down in two areas: (1) enhanced punishment statutes do not punish anew for the old crime, they punish the present one more severely because of the older crime; and

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[5] Arizona's are typical. A.R.S. §§13-1649 and 1650.

(2) the enhanced punishment statutes do not create a new offense. Since Arizona's 1580 does create a new offense and it does punish anew, it is not a typical enhanced punishment statute. It does, however, act much in the same manner, has some of the same procedural attributes and serves analogous state interests. 1580 is triggered only after conviction, it will ordinarily be a short, perfunctory process, it does result in enhanced punishment and it seeks to deter those who would commit felonies evincing more than average proclivities to thwart criminal justice procedures. There is also a close analogy in this regard to the District of Columbia statute increasing the penalty for an offense committed while on bond. D.C. Code Ann. 23-1328. All three procedures seek to increase penalties for offenses committed in what legislators have determined are aggravated situations. The fact

that Arizona creates a separate offense to accomplish this which offense cannot be fully committed until conviction of the triggering felony does not, of itself, show that the method selected is unconstitutional. In fact, the constitutional safeguards afforded a defendant in Arizona under 1580 may well be in excess of what he would be afforded in the District of Columbia or a state having an enhanced punishment statute.

Petitioner argues that even within the Blockburger test, the proof here was the same because for each conviction the state proved the same essential fact -- a burglary, the same burglary. Therefore, upon the same set of proved facts, he is being punished for two crimes whereas someone else who performed the same act while not being on bail would be punished only for one crime. This argument fails in two particulars. First, the same

proof is not presented at both trials. At the burglary trial the state offers evidence of the petitioner's acts that led to the burglary. Here, his being found in a closed commercial building at night gathering items. At the 1580 trial the proof is not of the acts, but the conviction that resulted from those acts plus petitioner's bail status. Secondly, the "required proof" Blockburger speaks of is not the proof that is actually presented but the theoretical proof a conviction would require, or, put another way, the essence of the violation not the evidence. This aspect of Blockburger was brought into sharp focus in an opinion by this Court twenty-seven years later, Harris v. United States, 359 U.S. 19 (1959). Harris was charged in a two-count indictment with purchasing heroin from an unstamped package and receiving the same heroin knowing it to have been unlawfully imported.

For its evidence as to both counts, the government introduced the heroin itself and testimony that Harris possessed it. For the rest of its proof, the government rested upon two statutory presumptions: (1) that the absence of a tax paid stamp raised a prima facie case that the heroin was purchased not in the original stamped package, and (2) that possession alone authorized a conviction for receiving knowing it to have been unlawfully imported.[6] Mr. Harris maintained that, on the basis of Blockburger, the two cumulative sentences could not stand because both were based on the single act of possession. This Court disagreed, stating that were Blockburger to apply, the elements of the violated

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[6]These presumptions have subsequently been upheld, as to heroin, against constitutional attack in Turner v. United States, 396 U.S. 398 (1970).

statutes could not be equated with possession alone.[7] The government was required to prove more than mere possession; purchase plus something other than an original stamped package for the first count and, as to the second count, receipt and concealment of the narcotics, importation contrary to the law and Harris' knowledge of that illegal importation. The Court noted that it distinguished the violation from the evidence offered to prove it.

Two other cases are important to this aspect of the Blockburger test, Pinkerton v. United States, 328 U.S. 640 (1946) and Pereira v. United States, 347 U.S. 1 (1953). The Pinkerton brothers were charged with conspiracy and substantive offenses, some of the overt acts charged as

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[7] The Court felt the issue controlled more by Gore v. United States, 357 U.S. 386 (1958) than Blockburger.

part of the conspiracy were also charged and proved as the substantive offenses. Against one brother there was no direct evidence of his participation in the substantive offenses, the only evidence linking him to such acts was his participation in the conspiracy. Thus, for the act of conspiracy he was convicted and sentenced for the conspiracy as well as for the substantive acts. In Pereira the defendant was given sentences for transporting property in interstate commerce and using the mails to defraud. On the basis of Blockburger, both sentences were upheld even though the act that violated both statutes was the placing of a check obtained by fraud with an El Paso bank realizing that it would be sent by mail to another state. In each case, then, the concern of this Court was not what the proof was at the trial but what theoretical proof was necessary to sustain the charges.

Perhaps the most recent case on this point and one of the latest in the long line of "same evidence" test cases is Gore v. United States, 357 U.S. 386 (1958). Mr. Gore was charged in six counts with selling heroin not in pursuance of a written order (two counts), selling not from the original stamped package (two counts), and selling with knowledge that the heroin had been unlawfully imported (two counts). The six counts were built around two sale transactions, each transaction resulting in three counts alleging three distinct charges under different statutes. After conviction, consecutive sentences were imposed on each of the three counts pertaining to each sale and the total sentences on each sale were made to run concurrently with each other. Although noting that some had questioned the continued vitality of Blockburger, this Court reaffirmed its

holding that multiple punishments may be imposed on the consequences of a single sale of narcotics where separate statutory offenses are included in the same transaction.

This disquiet with Blockburger, noted by the majority in Gore, was apparently a feeling among some that the "same evidence" test was being abandoned in favor of the "same transaction" test. A finger had been placed on this feeling by the concurring opinion of Circuit Judge Bazelon in the Gore opinion below, Gore v. United States (D.C. Cir. 1957) 244 F.2d 763. As food for this thought, he cited United States v. Universal C.I.T. Credit Corp., 344 U.S. 218 (1952); Bell v. United States, 349 U.S. 81 (1955) and Prince v. United States, 352 U.S. 322 (1957).

The Gore majority met the challenge head on, distinguished those cases as dealing with disparate situations and

reaffirmed the vitality of Blockburger in multiple punishment situations.[8]

By reaffirming Blockburger, the Court, indirectly at least, gave new vitality to its prior, almost express, disapproval of the use of the "same transaction" test in multiple punishment situations.[9] The "same transaction"

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[8] Bell was distinguished as dealing with a statute (the Mann Act) where Congress had not expressed its will as to the allowable units of prosecution under it, thus calling for a judicial resolution of the doubt. The resolution being that where Congress had not expressed itself, the Court would decide in favor of lenity, which in that case was that the transportation of more than one woman was to be dealt with as a single offense. Universal C.I.T. and Prince fared no better; lenity requiring that the record-keeping provisions of the Fair Labor Standards Act be treated as one course of conduct and Prince as dealing with a unique statute of limited purpose. 357 U.S. 386, 391, 392.

[9] In Blockburger, the Court stated, "The case of Ballerini v. Aderholt, 44 F.(2d) 352, is not in harmony with these views and is disapproved." 284 U.S. 299, 304 . Ballerini was a Fifth Circuit case

test is generally not recognized as applying to multiple punishments resulting from one trial; it is aimed at multiple prosecutions and "the underlying idea . . . that the State with all its resources and power should not be allowed to make repeated attempts to convict an individual for an alleged offense, thereby subjecting him to embarrassment, expense and ordeal and compelling him to live in a continuing state of anxiety and insecurity . . ."

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dealing with one sale of opium violating two statutes, a sale not having paid the tax and a sale without a written order from the purchaser. In the trial court two crimes were charged and consecutive sentences were imposed upon the convictions. The Fifth Circuit reversed, holding that the sale was the essence of the transaction and that several crimes could not be carved out of that one unlawful act. It is arguable that this is not the "same transaction" test for that test would permit multiple charges and sentences as long as they all resulted from the same trial. See Ashe v. Swenson, 397 U.S. 436, 448 (Brennan, Douglas & Marshall, JJ., concurring).

Green v. United States, 355 U.S. 184, 187. Thus, it is not necessary to argue "same transaction" here. The tests are not competitors; the "same evidence" test safeguards Fifth Amendment rights in multiple punishment situations, "same transaction" in multiple prosecutions. See Ashe v. Swenson, 397 U.S. 436, 448 (Brennan, Douglas & Marshall, JJ., concurring); Abbate v. United States, 359 U.S. 187, 196 (Brennan & Marshall, JJ., separate opinion); Gore v. United States, 357 U.S. 386, 395 (Douglas, Marshall, J., dissenting). Moreover, the "same transaction" test should make an exception of our case -- where both crimes are not completed at the same time. See Ashe, supra, at 453 (Brennan, Douglas & Marshall, JJ., concurring); Diaz v. United States, 223 U.S. 442, 448-449 (1912).

In re Nielsen, 131 U.S. 176 (1889) is not controlling here. That case dealt with a subsequent trial and has not generally been regarded as setting precedent for single

trial situations. Patton v. North Carolina, 381 F.2d 636 (4th Cir. 1967); United States v. Gills, 357 F.2d 299 (4th Cir. 1966), cert. denied, 384 U.S. 933 (1966); Forsberg v. United States, 351 F.2d 242 (9th Cir. 1965), cert. denied, 383 U.S. 950 (1966). See Abbate v. United States, 359 U.S. 187, 196 (Brennan, J., separate opinion).

The Fifth Amendment does not put a limitation on legislative divisions of conduct into several substantive offenses, fixing a punishment on each. It does, however, forbid a court from multiplying punishments when the legislature intended only one. See Albrecht v. United States, 273 U.S. 1 (1926); 11 Stan.L.Rev. 735. Blockburger's "same evidence" test is a tool, perhaps simplistic, for making that determination -- if one crime contains an element the other does not, the legislature intended a punishment for each. Perhaps, as has been suggested

before,[10] the "same evidence" test doesn't go far enough, it merely points up a difference, not indicating which differences are major warranting two punishments. Legislative history and intent supply that dimension.

In Arizona it is evident the Legislature intended burglary and 1580 to be separate offenses and each to be severally punished. In 1969, in part at least because of a public clamor to update its bail structure and examine the proliferating problem of those on bail continuing their criminal careers, the Arizona Legislature enacted comprehensive bail statutes. One statute proposed a constitutional amendment permitting bail by sufficient securities except for "felony offenses, committed when the person charged

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[10]See District of Columbia v. Buckley, 128 F.2d 17, 21 (D.C. Cir. 1942) (Rutledge, A.J., concurring), cert. denied, 317 U.S. 658 (1942).

is already admitted to bail on a separate felony charge and where the proof is evident or the presumption great as to the present charge." Laws of 1969, H.C.R. No. 2, filed April 11, 1969. At the November 3, 1970, election, the voters passed the proposed amendment and it is now part of the Arizona Constitution, Art. 2, Sec. 22.

To complement the proposed constitutional amendment, the Legislature also passed a statute setting forth those things a judicial officer must consider in determining the method of release or amount of bail such as the circumstances of the offense charged, his family ties, his finances, his character and mental condition, his arrest and conviction record and his record of making court appearances. In addition, the statute conditioned release upon the defendant's good behavior and provided for a discretionary revocation of

the release upon a showing of probable cause that he committed a felony while on release. A.R.S. §13-1577, 1578.

On September 24, 1970, during the interval between the passing of these statutes and the ratification of the proposed constitutional amendment, the Arizona Supreme Court held A.R.S. §13-1577 and 1578 constitutional against attacks under the Arizona and United States Constitutions. Rendel v. Mummert, 106 Ariz. 233, 474 P.2d 824 (1970). Two months later the constitutional amendment was ratified and less than two years after that the Legislature passed A.R.S. §13-1580. See also 13 Ariz.L.Rev. 365-367.

All of this indicates a forceful and forthright attempt to convince those who might abuse the process that in the granting of bail society has the right to impose reasonable conditions on the conduct

of those released and that Arizona intended to insure that those conditions were met.

In addition, the very wording of 1580 shows that the Legislature had little doubt that it was creating a separate offense (". . . is guilty of the offense of . . .") to be visited with a severe punishment in addition to any other punishment for crimes committed while released on bail ("such penalty shall be in addition and shall be served consecutively to any penalty imposed for the offense committed while released on bail or on his own recognizance").

Finally, petitioner argues that if he is being punished for two separate crimes, one of them (A.R.S. §13-1580) punishes him for a status which is expressly prohibited by Robinson v. California, 370 U.S. 660 (1962). Robinson, however, does not punish for a

status. Robinson said only that the Eighth Amendment prohibited states from making narcotics addiction a crime. United States v. Brager, 474 F.2d 598 (5th Cir. 1973), cert. denied, 414 U.S. 846 (1973); United States v. Bishop, 469 F.2d 1337 (1st Cir. 1972); Castle v. United States, 347 F.2d 492 (D.C. Cir. 1964), cert. denied, 381 U.S. 929, 953 (1964), 388 U.S. 915 (1966); Jackson v. Dickson, 325 F.2d 573 (9th Cir. 1963). See Powell v. Texas, 392 U.S. 514, 533, 541 (Black, J., concurring; Fortas, J., dissenting); Duncan v. Louisiana, 391 U.S. 145, 149 (Fortas, J., dissenting); Budd v. California, 385 U.S. 909, 911 (Fortas, J., dissenting).

> "Moreover, status offenses have long been known and recognized in the criminal law. 4 Blackstone, Commentaries (Jones Ed., 1916), 170 . . ." Justice Clark dissenting in Robinson v. California, supra, 684.

It is true that when petitioner

committed his second burglary, his status was that of a charged felon on his own recognizance but neither Robinson nor any other authority cited by him would prevent a state from punishing him for that second burglary.

II.

From the earliest common law antecedents of bail in England, until the present day, "recognizances" were intended to insure the accused's appearance as the judiciary required and to demand that the accused "be of good behavior in the meantime". Compare The Queen v. Badger, 4 Q.B. 467, 114 Eng. Reprint 975, 977 (1843) with Nev.Rev.Stat. §178.487 (as amended 1973). This requirement of good behavior is a natural concomitant of the fact that a person released on "recognizance" or bail is subject to the power of the court. Although such an individual is released from the physical custody of the court (and the state), he is not released from the custody of the court to act in untrammeled freedom as the general public. In re Smiley, 66 Cal.2d 606, 58 Cal.Rptr. 579, 583, 427 P.2d 179, 183 (1967); People v. McCaughey, 261 Cal.App.2d

131, 67 Cal.Rptr. 683, 686 (1968), overruled in part on other ground, 6 Cal. 3d 693, 100 Cal.Rptr. 297, 493 P.2d 1161 (1972); State v. Chisolm, 29 Conn.Super. 339, 287 A.2d 389, 389-90 (1971); Lemme v. Langlois, 104 R.I. 352, 244 A.2d 271 (1971). The fact that bail is not absolute but subject to various conditions of the court and legislative branch merely re-emphasizes the fact that release pending trial does not give the accused release to carry on at his whim like an ordinary citizen. See 28 U.S.C. §3146 (1970); Hensley v. Municipal Court, 411 U.S. 345, 348, 351 (1973); Carlson v. Landon, 342 U.S. 524, 545 (1952); Rehman v. State of California, 85 S.Ct. 8, 9, 13 L.Ed.2d 17, 18-19 (1964, Douglas, J., Circuit J.); Stack v. Boyle, 342 U.S. 1, 4-5 (1951); Brown v. Fogel, 387 F.2d 692, 695 (4th Cir. 1967), cert. denied, 390 U.S. 1045 (1968); Brown v. United States,

410 F.2d 212, 213, 215 (5th Cir. 1969); United States ex rel. Fink v. Heyd, 408 F.2d 7 (5th Cir. 1969), cert. denied, 396 U.S. 895 (1969); Mastrian v. Hedman, 326 F.2d 708, 710-11 (8th Cir.), cert. denied, 376 U.S. 965 (1964). See also Appendix I.

Petitioner's allegations must be focused and examined from this background. Upon such inspection, along with a consideration of relevant equal protection decisions, the weakness and misconceptions of petitioner's equal protection argument become clearly apparent.

Petitioner's argument basically devolves to at least partially inconsistent assumptions that (1) respondent has granted a right to bail and has invidiously discriminated against appellant in implementing this state right to bail, and (2) respondent has "chilled" or impaired the exercise of the "fundamental right"

to bail,[11] thus requiring respondent to show that 1580 is demonstrably necessary to promote a compelling state interest. The fallacy or omission in petitioner's argument is that it assumes as true the propositions he espouses. Rather than

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[11] This Court has apparently never expressly held that the prohibition against "excessive bail" in the Eighth Amendment applies to the states through the Fourteenth Amendment, although many courts have "assumed" or held that the Eighth Amendment does apply to the states. See, e.g., Wallace v. McDonald, 369 F. Supp. 180, 185 (E.D.N.Y. 1973); United States ex rel Kane v. Bensinger, 350 F. Supp. 181, 183 (N.D. 1972), aff'd 484 F.2d 874 (7th Cir. 1973); Grady v. Iowa State Penit., 346 F.Supp. 681, 682 (N.D.Ia. 1972); Akies v. Purdy, 322 F. Supp. 38, 41 (S.D.Fla. 1970); Koen v. Long, 302 F.Supp. 1383 (E.D. Mo. 1969), aff'd 428 F.2d 876 (8th Cir. 1970), cert. denied, 401 U.S. 923 (1971); United States ex rel. Siegal v. Follette, 290 F.Supp. 632, 634 (S.D.N.Y. 1968); United States ex rel. Goodman v. Kehl, 456 F.2d 863, 868 (2nd Cir. 1972); Mastrian v. Hedman, 326 F.2d 708, 711 (8th Cir.), cert. denied, 376 U.S. 965 (1964). This Court's statements in Schilb v. Kuebel, 404 U.S. 357 (1971), seem to indicate that these courts were correct. See id. at 365.

show that a fundamental right has been impaired[12] or that respondent has implemented its statutory right to bail in a discriminatory manner, petitioner merely takes these basic and essential assumptions for granted by merely setting forth broad constitutional principles having no relation to the facts or allegations

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[12] It seems clear that the burden of showing an impairment or chilling of a fundamental right is on the petitioner. Merely because a fundamental right is involved the "compelling state interest" test does not have to be met absent such a showing. See American Party of Texas v. White, 415 U.S. 767, 781 (1974); Memorial Hospital v. Maricopa County, 415 U.S. 250, 256 (1974); Shapiro v. Thompson, 394 U.S. 618, 683 (1969) Schilb v. Kuebel, supra, n. 1, 404 U.S. at 364 (invidious discrimination necessary); Houston v. Prosser, 361 F.Supp. 295, 298 (N.D.Ga. 1973).

in this case.[13]

Despite petitioner's bare assertions, an examination of the facts presented by this case and the decisions of this Court shows that 1580 does not penalize or chill the exercise of a fundamental right or create an invidious discrimination, at least one of which is necessary in sufficient quantity to trigger the "compelling state interest" test. Before a classification will be condemned under the equal protection cause, there must be a showing

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[13] For instance, petitioner cites Sherbert v. Verner, 374 U.S. 398 (1963), as an equal protection case, but Sherbert expressly said that this Court's decision was on due process and equal protection was not reached. Id. at 409. See also Williams v. Rhodes, 393 U.S. 23, 30-31 (1968) (not equal protection basis for decision but First Amendment rights through the Fourteenth Amendment).

that the classification penalizes[14], burdens[15] or infringes[16] a fundamental right or that the classification is so unrelated to its avowed purpose that it constitutes an invidious discrimination[17]

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[14] Shapiro v. Thompson, 394 U.S. 618, 634 (1969) (citing other cases); United States v. Jackson, 390 U.S. 570, 582 (1968); Memorial Hospital v. Maricopa County, 415 U.S. 250, 256, 257 (1974).

[15] Cleveland Board of Education v. LeFleur, 414 U.S. 632, 640 (1974); American Party of Texas v. White, 415 U.S. 767, 781, 783 (1974); Rosario v. Rockefeller, 410 U.S. 752, 760 (1973).

[16] Kusper v. Pontikes, 415 U.S. 51, 57 (1974); Roe v. Wade, 410 U.S. 113, 162-64 (1973); Rosario v. Rockefeller, 410 U.S. 752, 762 (1973).

[17] Johnson v. Robison, 415 U.S. 361, 374-75, 378 (1974); Storer v. Brown, 415 U.S. 724, 731, 736(1974); Gaffney v. Cummings, 412 U.S. 735, 741, 751-52 (1974); James v. Strange, 407 U.S. 128, 139-40 (1972); Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719, 724 (1973); Rosario v. Rockefeller, 410 U.S. 752, 760, 762 (1973); Gaffney v. Cummings, 412 U.S. 735, 736, 751-52 (1972).

which serves no purpose other than to chill[18] the exercise of a constitutional right. For example, as this Court recently held in Ross v. Moffitt, 94 S.Ct. 2437 (1974), mere differences in treatment of classifications not amounting to arbitrary or invidious discrimination does not violate the equal protection clause; there is no requirement that wealthy and poor individuals be accorded absolute equality, or that all handicaps of indigents be erased. Id. at 2442-43, 2445-47. Similarly, in Storer v. Brown, 415 U.S. 724 (1974), the principle that

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[18] Shapiro v. Thompson, 394 U.S. 618, 630 (1969); United States v. Jackson, 390 U.S. 570, 582 (1968); In Re King, 11 Cal.3d 226, 234, 90 Cal.Rptr. 15, 20-21, 474 P.2d 983, 988-89 (1970); Younger v. Harris, 401 U.S. 37, 51 (1971); Koen v. Long, 302 F.Supp. 1383, 1397-98 (E.D. Mo. 1969), aff'd 428 F.2d 876 (8th Cir. 1970), cert. denied, 401 U.S. 923 (1971).

invidious or arbitrary discrimination is a necessary showing in equal protection cases was reiterated. Id. at 731-32, 737.

Thus, absolute equality among all individuals is not required under the equal protection clause, and classifications can be made between individuals or groups as long as they are not invidiously discriminatory and the state is seeking to fulfill a legitimate state interest by means having a substantial or rational connection to the purpose of the statute. Eisenstadt v. Baird, 405 U.S. 438, 446-47 (1972); Skinner v. Oklahoma, 316 U.S. 535, 540 (1942); American Party of Texas v. White, 415 U.S. 767, 781-82, 786 (1974); Storer v. Brown, supra, 415 U.S. at 729-31; Gedulig v. Aiello, 94 S.Ct. 2485, 2491, 2492 & n.20 (1974).

In the case at bar, before these principles can be applied, a mistake in petitioner's "classification" must be

corrected. Petitioner states that persons released into the custody of third parties or subject to other conditions than pure personal ("own") recognizance do not fall within 1580, which speaks of release on bail or "own recognizance". However, petitioner's argument overlooks Rule 7.1(a) of the Arizona Rules of Criminal Procedure, codified in Vol. 17 A.R.S. (1973 ed.) which defines "own recognizance" as release without a condition of "an undertaking relating to a deposit of security". Furthermore, under A.R.S. §13-1577(E) (as amended 1969) "conditions" may be attached to release on "own recognizance" or on bail. Thus, persons released under various conditions such as third party custody would fall within 1580, contrary to petitioner's assertions.

The sole distinction between the two "classes" created by 1580 is that persons released pending trial can be guilty of

another felony if they violate the mandatory conditon of Rule 7.3(a)(2) and A.R.S. §1577(D) that pre-trial release "is conditioned upon the defendant's good behavior while so released". The obligation not to violate the law also applies to those persons not released before trial. Therefore, requiring obedience to the law is not the sort of "severe" or "substantial" penalty or restriction necessary to trigger an equal protection violation. Cf. Ross v. Moffitt, supra, 94 S.Ct. at 2443-45 (1974); Storer v. Brown, supra, 415 U.S.at 735; Schilb v. Kuebel, 404 U.S. 357, 364-65, 367 (1971); Chimento v. Stark, 353 F.Supp. 1211, 1215, 1218 (D.N.Hamp. 1973), aff'd 404 U.S. 802 (1973) (mem.); Younger v. Harris, 401 U.S. 37, 5[illegible] (1971); Graves v. Barnes, 343 F.Supp. 704, 719-20, 735 (W.D. Tex. 1972), aff'd 409 U.S. 808 (1973), modified 412 U.S. 755 (1973). As noted, the

Fourteenth Amendment does not require absolute equality for all persons. Arizona, through its statutory provisions (A.R.S. §1577) Rules of Criminal Procedure (Rule 7 in passim) and its case law [see ABA Standards, Pre-Trial Release, at 5-6, (approved draft 1968)], has set up a system of pre-trial release aimed at securing the release of all criminal defendants without monetary conditions which is among the most broad and liberal provisions in the nation. (See Appendices I and II.) The enactment of 1580 was concurrent with the entire pre-trial release scheme set up in Arizona. Because release "O.R.", or "bail" without money is so strongly emphasized, protection of the public against abuse due to the increasing numbers of freed criminal defendants was only reasonable. By enacting 1580, the dubious spectre of "preventive

detention"[19] was avoided in Arizona. Instead, a defendant is released and "holds the key" to his continued pre-trial release in his pocket because all he is required to do is obey the law as ordered by the court

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[19] The problems inherent in preventive detention and the dubious likelihood of predicability under current conditions has been frequently noted. Rendel v. Mummert, 106 Ariz. 233, 238-39, 474 P.2d 824 (1970). See Just, Bail and Pre-Trial Detention in the District of Columbia: An Empirical Analysis, 17 How.L.J. 844, 852 (1972); 75 Dick.L.Rev. 639, 643, 645, 647, 649 (1970); Hess, Pre-Trial Detention, 37 Brook.L.Rev. 277, 279, 280, 283-84, 286-89, 305 (1971); Note, the Costs of Pre-Trial Detention, 79 Yale L.J. 926, 926-928, 931 & n. 19 (1970); Symposium, 8 Col.J.L. & Soc. Pb. 1, 8-9, 18 (1972); 7 Col.J.L. & Soc.Pb. 350 (1971); Note, 9 Col.J.L. & Soc. Pb. (1973); Wice, Bail Reform in American Cities, 9 Crim.L. Bull. 770, 782-83 (1973); Pfuhl & Zabezensky, 1972 L. & Soc. Order 409 (study of Phoenix release before 1973 Arizona Rules of Criminal Procedure promulgated).

when he is released. Cf. Rendel v. Mummert, 106 Ariz. 233, 238, 474 P.2d 824, 829 (1970).

The case at bar is thus amenable to the "rational basis" analysis because when the threshold requirement of a substantial infringement, penalty or burden upon a fundamental right is not met, the courts will use the rational basis test instead of the compelling interest test, even where fundamental rights are involved. See Schilb v. Kuebel, supra, 404 U.S. at 365-66; Houston v. Prosser, 361 F.Supp. 295, 298-99 (N.D.Ga. 1973).

Under the rational basis test the condition that defendants obey the law is rationally related to the purpose of bail -- assuring the defendant's presence at trial.[20] First, 1580 is similar to

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[20] E.G. Gusick v. Boies, 72 Ariz. 309, 234 P.2d 430 (1951); Carlson v. Landon, 342 U.S. 524, 545 (1952); Wagner v. United States, 250 F.2d 804, 805 (9th Cir. 1957).

the various "bail jumping"[21] statutes (see Appendix I); just because Arizona has not "gone all the way" and enacted a "failure to appear" statute but has aimed at one specific problem area of pre-trial release -- the problem of recidivism or commission of crime while released[22] -- does not make 1580 constitutionally improper. See, e.g., Skinner v. Oklahoma, 316 U.S. 535, 540 (1942); Gedulig v. Aiello, supra, 94 S.Ct. at 2491; Schilb v. Kuebel, supra, 404 U.S. at 364; Harbold v. Richardson, 464 F.2d 1063, 1065 (3rd

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[21] The national bail-jumping statute is similar to those listed in Appendix I. See 18 U.S.C.§3150 (1970). Its validity has often been upheld. E.g., United States v. Dorman, 496 F.2d 438 (4th Cir. 1974); United States v. Currier, 405 F.2d 1039 (2nd Cir. 1969), cert. denied, 395 U.S. 914 (1970).

[22] Under 1580 and Arizona law, bail is not revoked automatically upon a subsequent commission of an offense but only after a hearing with a very high burden on the prosecutor and even then the judge has discretion to continue a defendant on bail. See A.R.S. §13-1578(B) (as amended 1969).

Cir. 1972).[23]

The rationality of 1580 is buttressed by reference to the basic principles underlying bail that reasonable conditions may be imposed on pre-trial release (supra, pp. 33-35). Insuring the appearance of the defendant is the main goal of bail conditions. Thus, making failure to appear a separate felony has been upheld consistently. However, as this Court held in Hensley v. Municipal Court, 411 U.S. 345 (1973), a person released on bail cannot come and go as he pleases but his freedom of movement rests in the court's hands as a condition of release and disobedience of this condition is itself a criminal offense. Id. at 351. Similarly, any condition reasonably imposed on a defendant's pre-trial release which could threaten his appearance can be made a criminal offense by the State.

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[23] See articles listed in n. 19, supra.

For example, in People v. Sanders, _____ Colo._____, 522 P.2d 735 (1974), a statutory provision that a person released "O.R." who commits a felony or certain misdemeanors shall not be admitted to release on the later offense was upheld as having a reasonable relationship to the main goal of assuring a defendant's presence at trial.[24] Id. 522 P.2d at 736-37. As one court has held, the risk of flight increases "proportionately" with the commission of subsequent offenses while released on bail, because of the possibility of cumulative penalties and other considerations. Bigley v. Warden, Maryland Corr. Institute for Women, 16 Md.App. 1,

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[24] Sanders also pointed out the main purpose of bail is assuring presence at trial. People v. Sanders, _____ Colo._____, 522 P.2d 735, 736 (1974). Also, Sanders discussed the problem of separation of powers, since the prosecution has to ask for the defendant to be revoked from bail or O.R. status. Id. at 736-37.

294 A.2d 141, 145 (Ct. Special App. 1972). A number of other legal commentators[25] and many state and federal court decisions have recognized, either explicitly or implicitly, that commission of other offenses while released on bail is likely to enhance the chances that a defendant will flee -- as well as noting the corruption of the criminal justice system by such subsequent violations.[26]

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[25] See n. 19, supra.

[26] It would appear that the administration of justice and protecting its integrity is another rationale of the bail cases. See United States v. Cardillo, 473 F.2d 325 (4th Cir. 1973); People v. Sanders, supra, n. 13; Williams v. State, 229 So.2d 2 (Fla.App. 1969); People v. McCaughey, 261 Cal.App.2d 131 (1968) and cases cited therein. Such an interest seems constitutionally valid and recognized. See Hensley v. Muncipal Court, 411 U.S. 345 (1973); Ross v. Moffitt, 94 S.Ct. 2437, 2443-47 (1974); California Bankers Ass'n v. Schultz, 416 U.S. 21, 76-77 (1974).

State v. Chisholm, 29 Conn.Super. 339, 287 A.2d 389, 389-91 (1971); United States v. Rabena, 339 F.Supp. 1140, 1141-43 (E.D.Pa. 1972); United States v. Campbell, 314 F. Supp. 157, 159 (D.Mass. 1970); Jordan v. Peyton, 264 F.Supp. 946, 951 (W.D. Va. 1967); Pilkington v. Circuit Court of Howell County, Mo., 324 F.2d 45, 46 (8th Cir. 1963); Hansford v. United States, 353 F.2d 858, 859-60 (D.C. Cir. 1965); Williams v. State, 229 So.2d 2, 3 (Fla. App. 1969); People v. Norman, 252 Cal. App.2d 381, 60 Cal.Rptr. 609, 622-23, 631-32 (1967), cert.denied, 391 U.S. 932 (1968); Rendel v. Mummert, supra, 106 Ariz. at 237-38. See, generally, United States v. Louie, 289 F.Supp. 850, 851-52 (N.D. Cal. 1968); United States v. Gamble, 295 F.Supp. 1192, 1193-94 (S.D. Tex. 1969) (A.W.O.L. can be considered for flight but not just to punish); United States v. Erwing, 268 F.Supp. 877, 879 (N.D.Cal.

1967); United States v. Nelson, 346 F. Supp. 926, 928 (S.D. Fla. 1972), aff'd 467 F.2d 944 (5th Cir. 1972), cert. denied, 410 U.S. 956 (1973); United States v. Cardillo, 473 F.2d 325, 327 (4th Cir. 1973); Fernandez v. United States, 314 F.2d 289, 290 (9th Cir. 1963), cert. denied, 379 U.S. 832 (1964); Commonwealth v. Truesdale, 449 Pa. 325, 296 A.2d 829, 836-37 (1972); Ex Parte Jester, 403 S.W.2d 133, 134 (Ct.Cr.App. Tex. 1966).

Petitioner also argues that 1580 is constitutionally reprehensible since it contravenes the presumption of innocence. However, respondent has pointed out already (see note 22, supra) that before a person can have his bail revoked for committing an offense on bail a hearing with a very high test is necessary.[27]

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[27] Such revocation is analogous to statutes which bar bail completely for various offenses or persons and which have been repeatedly upheld (A.R.S. §§13-1577

Moreover, this argument is completely inconsistent with the provisions of 1580 since proof beyond a reasonable doubt of a prior conviction while released which itself has to be established beyond a reasonable doubt is necessary for a conviction under 1580. Allegations that the federal statute making it a crime for a person under indictment for an offense (even a state indictment) to possess and ship arms or ammunition in interstate commerce violates the equal protection and due process clauses have been consistently rejected. United States v. Thoreson, 428

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and 1580 are thus less restrictive than such statutes because the defendant may be continued on release in Arizona). See Rendel v. Mummert, supra, n. 9, at 236-38; Stack v. Boyle, 342 U.S. 1, 4-6 (1951); McCarroll v. Faust, 278 F.Supp. 448, 451-52 (E.D.La. 1968); Corbett v. Patterson, 272 F.Supp. 602, 607 (D.Colo. 1967); Richburg v. State, 238 So.2d 296, 298-300 (Fla. 1970).

F.2d 654, 659-62 (9th Cir. 1970); United States v. DePugh, 266 F.Supp. 453, 454-55 (W.D. Mo. 1967), cert. denied, 393 U.S. 832 (1968). The rationale of these cases is that the defendant still comes to trial clothed with his presumption of innocence.[28] United States v. Thoreson, supra, 428 F.2d at 661. Likewise, the defendant in a 1580 case never loses his presumption of innocence.

Likewise, petitioner's argument that 1580 is somehow invalid because the prosecutor has discretion to proceed under it or not is spurious, since such discretion arguably applies to all statutes and has not been found unconstitutional absent some showing of discrimination. See United States v. Clearfield, 358 F.Supp. 564, 577-78 (E.D.Pa. 1973); United States v. Maplewood Poultry Co., 320 F.Supp. 1395

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[28] See Hess, supra, n. 9, at 305, n. 163.

1396 (N.D. Maine 1970); Washington v. United States, 401 F.2d 915, 923-25 (D.C. Cir. 1968); 65 J.Crim.L. & Criminology 62 (1974); 72 Mich.L.Rev. 1113 (1974).

Although respondent submits that petitioner has made an inadequate showing[29] to merit review under the "compelling state interest" equal protection test, 1580 is not constitutionally infirm and should be upheld even under this test. At present, the status of equal protection cases in general, and compelling interest cases specifically, can be characterized as one of variegated inconsistency. At least, this is the impression conveyed by numerous legal commentators reviewing this Court's latest equal protection cases.[30]

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[29] It is debatable whether petitioner has even shown an identifiable "class" as that term is defined by this Court. See generally Gordon v. Vance, 403 U.S. 1, 5, 7 (1971).

[30] According to a general review of legal commentators, this Court's dissatisfaction with the "two-tiered" equal protection

Respondent submits, however, that perusal of recent equal protection cases handed down by this Court provides sufficiently cogent and articulable standards upon which to resolve this case.

It is true that this Court has recognized that the compelling interest test

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tests has led to uncertain wavering and decision by speculation because this Court has adopted (or wants to or should adopt), a "new" equal protection test sub silentio. See, e.g., Nowak, Realigning the Standards of Review Under the Equal Protection Guarantee -- Prohibited, Neutral, and Permissive Classifications, 62 Geo.L.J. 1071, 1122 (1974); Note, 62 Geo. L.J. 1173 (1974); Gunther, The Supreme Court, 1971 Term-Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection, 86 Harv.L. Rev. 1, 8, 22-24, 25-26 (1972); Note, 26 Stan.L.Rev. 155, 163-64 (1973); 59 Cornell L.Rev. 1139, 1143, 1159-60 (1974); 53 Nebr.L.Rev. 312, 317-20 (1974); Symposium, 23 Emory L.Rev. 643-723 (1974); Comment, 41 Fordham L.Rev. 605 (1973); 25 Vand.L. Rev. 180, 183, 193-95 (1972); Note, 82 Yale L.J. 123, 128 (1972); Tushnet, 1974 Wisc.L.Rev. 77, 196; 58 Minn.L.Rev. 965 (1974).

has been "variously formulated". In re Griffiths, 413 U.S. 717, 721 (1973). Nevertheless, in Griffiths this Court went on to collate these "variances" and held that the compelling interest cases as a whole have established a principle or test which requires the State to meet certain standards of proof in order to justify the use of suspect classifications, to wit, the state must show its interest or purpose is both constitutionally permissible and substantial, as well as showing that the classification is necessary to the accomplishment of this purpose or to the safeguarding of its interest. Id. at 721-22 and nn. 8-11.[31]

This formulation or explanation of

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[31] In Griffiths, the total exclusion of aliens from the practice of law was held to violate equal protection. In re Griffiths, 413 U.S. 717, 718, 724-29 (1973).

the compelling interest test should scarcely be startling or "new" in light of the holding in Eisenstadt v. Baird, 405 U.S. 438, 446-47 (1972), that the compelling interest test requires a fair and substantial relationship to legitimate state purposes and that persons similarly situated should be treated alike. See Reed v. Reed, 410 U.S. 71, 75-77 (1971). What is essentially the same formulation was set forth in Dunn v. Blumstein, 405 U.S. 330 (1972), which held that in determining whether there is an equal protection violation this Court will look to three things: (1) the character of the classification in question; (2) the individual interest affected by the classification; and, (3) the governmental interests asserted in support of

the classification.[32] Id. at 335.

Perhaps the most important principle pointed out and followed in Dunn in later cases is the holding that the "key words" in the compelling interest test are really a matter of degree, which cannot just be rigidly affixed to the plethora of legal situations they will have to be applied to, like a "litmus paper" can be in scientific analyses. Id. at 343, 348; Ross v. Moffitt, supra, 94 S.Ct. at 2445; Storer v. Brown, supra, 415 U.S. at 729-31. The compelling interest test is not an

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[32] It would appear that this three-pronged test is considered more in the nature of broad, general guidelines which still need further specification such as Griffiths and Eisenstadt. This three-pronged guideline (or starting point) has been reiterated numerous times. E.G., Salyer Land Co. v. Tulare Lake Basin Water Storage District, 410 U.S. 719, 725 (1973); see Williams v. Rhodes, 393 U.S. 23, 30 (1968) (slight variation in wording).

"absolute" shibboleth used to justify the Court's pre-determined resolution of a case. Instead, the compelling interest test is flexible, a matter of degrees which must be re-aligned for the facts of each case. Thus, for varying situations slightly different considerations predominate or are considered in affixing the "degree" to which governmental action is permissible versus the degree of the individual's interest affected by the action. See Ross v. Moffitt, supra, 94 S.Ct. at 2444-45 (main consideration degree of discrimination or inequality permissible); Storer v. Brown, supra, 415 U.S. at 730 (major consideration the degree to which "hard" governmental judgments which must be made are proper versus when degree of lines becomes invidious or arbitrary); Gedulig v. Aiello, 94 S.Ct. 2485, 2490-92, n. 20 (1974) (determination made by degree of legitimate governmental limitation

permissible before degree becomes invidious or arbitrary); Gaffney v. Cummings, 412 U.S. 735, 741, 743, 751-54 (1973) (nature of interests made degree turn on the issue of whether the line was crossed to invidious or discriminatory point). Thus, in Frontiero v. Richardson, 411 U.S. 677 (1973), the determination of whether a forbidden degree of governmental intrusion occurred over the line of individual rights devolved to (1) whether basic concepts, such as the necessity of legal burdens having to bear some relationship to individual responsibility, rather than inherent or immutable characteristics (e.g., gender) were remembered, and (2) whether the basically neutral or proper purpose of administrative convenience crossed the line to a degree constituting its recitation as a shibboleth of constitutionality where none really exists. Id. at 686-87, 690-91.

Before applying these broad principles to the case at bar, rather than merely reciting them as petitioner does, three other considerations or rules established by this Court should be set forth. First, since the compelling interest test is a matter of degrees, it does not require meeting impossible or unrelenting standards or barriers -- as exemplified by the rules just set forth supra.[33] Second, even in

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[33] At least a portion of the legal commentators' consternation at this Court's willingness to make the compelling interest test meaningful rather a simple excuse for invalidation of disfavored laws is their failure to recognize that equal protection, just like due process, is flexible and not a "frozen" list of categories. See Dillenberg v. Kramer, 469 F.2d 1222, 1224, 1226 (9th Cir. 1972) (applying "general", three-part test of Dunn, court noted equal protection concepts are not "immutably frozen like insects in . . . Devonian amber").

The fact that the compelling interest test does not mandate meeting rigid, narrow and virtually perfect models of absolute preciseness is shown by the kind of cases which have held the compelling interest test met. See, e.g., Mon Chi

areas involving fundamental rights mathematical formulas for scientific asymmetry weighed on a jeweler's scale cannot be, and are not required to uphold the hard and unscientific judgments legislators must reach in defining and passing legislative enactments (i.e., "degrees"). Skinner v. Oklahoma, supra, 316 U.S. at 540; James v. Strange, 407 U.S. 128, 133 (1972); Dunn v. Blumstein, supra, 405 U.S. at 342; Gaffney v. Cummings, supra, 412 U.S. at 743. Finally, merely because a legislative enactment "manifests a concern

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Heung Au v. Lum, 360 F.Supp. 219, 222 (D.Haw. 1973) (state's interest in eliminating fraudulent assertions of domicile -- in this case, however, irrebutable durational presumptions were improper); Chimento v. Stark, 353 F.Supp. 1211, 1214-15, 1217-18 (D.N. Hamp.), aff'd 414 U.S. 802 (1973) (seven year residency requirement to run for governor promotes legitimate state interests of first-hand knowledge and familiarity with state problems and excluding "frivolous" candidates); cf. Schilb v. Kuebel, 404 U.S. 357, 364-65, 367-68 (1971).

for the enforcement of the criminal law" does not cast a "generalized pall of constitutional suspicion" over it. California Bankers Ass'n v. Schultz, 416 U.S. 21, 76-77 (1974).

Finally applying these rules to 1580, it is clear this statute meets the various requirements of the compelling interest test. The purposes of 1580 are weighty and legitimate: (1) it is part of Arizona's liberal bail scheme which maximizes the pre-trial release of defendants without monetary impediments except as a last resort; (2) society has a legitimate and grave interest in insuring the presence of defendants at trials and in preventing defendants released under extremely liberal release standards from violating the conditions of their release and from violating the law in repetitious manner; and, (3) the administration of justice is undermined if defendants released under

the custody of the courts are permitted to engage in criminal activities.

The classification itself is innocuous -- it merely gives an increased or additional penalty to those who violate the law when they have been released under an express promise not to. Thus, culpability or distinction is based on the individual's own deliberated actions -- not on an inherent characteristic. Any distinctions a defendant is exposed to under 1580 are brought on by his own criminal actions. There are no invidious or arbitrary differences made where none exist. Rather, by violating the terms of his release and the laws of society, a defendant is legitimately subjected to criminal sanctions.

The sanctions themselves are not excessive in comparison to the penalties imposed in the analogous area of bail jumping. Moreover, the interests of

individuals affected by 1580 are no more than a requirement of obeying the terms of their release and obeying the laws every other citizen has to. Because of his different status in being released subject to the custody of the court and because amassing a number of criminal violations can lead to more and more serious offenses, the interests of an individual are not unduly or irrationally subjected to criminal penalties through 1580.

Respondent's final argument is that the frivolity and lack of merit in petitioner's equal protection argument is shown by the fact that the Court of Appeals decision reversed by the Supreme Court of Arizona [which forms the basis if not entirety of petitioner's equal protection argument -- see State v. Cassius, 21 Ariz.App. 78, 512 P.2d 903 (1973)], acknowledges that increased punishment

for the actions barred by 1580 would be proper [as Congress has done for the District of Columbia, D.C. Code Ann. §23-1328 (1971)]. However, the Court of Appeals held and petitioner argues that making such actions a crime is an unconstitutionally greater burden than merely enhancing punishment. Respondent submits that this distinction between making it a crime to violate release conditions and penalizing violations without making them a separate crime is constitutionally irrelevant and does not render 1580 "constitutionally vulnerable". Cf. Schilb v. Kuebel, supra, 404 U.S. at 367-68. At most, such a distinction or action merely reviews the wisdom and efficacy of 1580, which the federal courts will not do.[34]

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[34] See James v. Strange, 407 U.S. 128, 133 (1972); Kahn v. Shevin, 416 U.S. 351, 356 n. 10 (1974); Brown v. Supreme Court of Va., 359 F.Supp. 549, 554 (E.D.Va. 1973), aff'd 414 U.S. 1138 (1973) (mem.); Gordon v. Vance, 403 U.S. 1, 6-7 (1971); Renev v. Beto, 447 F.2d 20, 22 (5th Cir. 1971).

CONCLUSION

Petitioner's convictions under A.R.S. §13-301 and A.R.S. §13-1580 each required proof of an element not required by the other and thus were separate offenses not subjecting petitioner to twice being put in jeopardy.

The provisions of A.R.S. §13-1580 are rationally related to a legitimate state interest and thus satisfy the requirements of the "rational basis" test. Even if petitioner has made a sufficient showing to trigger use of the "compelling state interest" test, A.R.S. §13-1580 comports with the equal protection clause because 1580 is substantially related to furthering Arizona's valid interests while affecting the rights of individuals only as much as necessary. Therefore, petitioner's equal protection arguments are without merit.

Because of this, the judgment and

sentence affirmed by the Arizona Supreme Court in this case should be affirmed by this Court.

Respectfully submitted,

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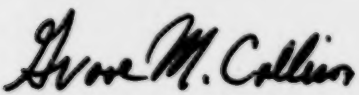

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DECEMBER 1974

APPENDIX I

STATUTORY BAIL JUMPING PROVISIONS OF THE VARIOUS STATES

1. Code of Ala. Title 15, §§ 185-218 (1959) - Money bail system.
   Bail Jumping Provisions: None - forfeiture of bond only.

2. Alaska Stat.'s § 12.30.020 (as amended 1974) - Released pending trial on own recognizance [hereinafter referred to as "O.R." release] or unsecured personal bond unless not likely to appear or danger to society.
   Bail Jumping Provisions: Alaska Stat. § 12.30.060 (1966) - Wilfully failing to appear for felony constitutes felony; up to five years imprisonment.

3. Ark.Stat.Ann. § 43-723.1 (as amended 1971) - Failure to appear as agreed constitutes felony (besides bail forfeiture); possible sentence, five years.

4. West's Ann. Cal. Codes, Penal - Failure to appear as agreed is felony, punishable up to five years.

5. Colo. - No bail jumping penalties except bail revocation.

6. Conn.Stat.Ann. §§ 52a-35, 172 (Vol. 27A 1972) - Person released who fails to appear guilty of felony, punishment not to exceed five years.

7. Del. Code Ann. §§ 2101-2114 (as amended 1968) - Under § 2105 release O.R. if likely to appear and no substantial risk to the community.
   Bail Jumping Provisions: Del. Code

Ann. § 2113 - Failure to appear or breach any conditions of release [§ 2108(i) allows any condition "deemed reasonably necessary"] leads to arrest warrant and failure to appear or breach of conditions is a separate crime if released on one or more felonies; sentence of up to five years possible.

8. West's Fla.Stat.Ann. § 900.131 (1973) - If a person is admitted to bail and convicted of a felony bail shall be revoked and the defendant committed "forthwith".
   See Rules of Criminal Proc. 3.130(b)(4), (e)(1972) - O.R. release.

9. Code of Ga.Ann. § 27-093 (1971) - Person entitled to "one bail" for the same offense as a "matter of right".
   Bail Jumping Provisions: Forfeiture only, no separate crime.

10. Hawaii - Forfeiture only.

11. Idaho Code § 19-2902 - Money bail.
   Bail Jumping Provisions: Idaho Code § 19-2927 - Forfeiture only.

12. Smith-Hurd Ill.Ann.Stat. Title 38, § 32-10 (as amended 1972). Wilful failure to appear is a felony.

13. Ind. Penal Code § 35-14.1-3-5 (1974). Failure to appear in a felony case is a "Class D" felony.

14. Iowa Code Ann. § 763.19 (as amended 1967) - Besides forfeiture, if person released on felony charge fails to appear shall be punished by imprisonment of not more than five years.

15. Kansas - Forfeiture and revocation only apparently.

16. Ky.Rev.Stat. (Bobbs-Merrill Official Ed. 1973) § 432.361. Failure to appear constitutes a felony; penalty one to ten years.

17. West's La.Stat.Ann. § 14:110.1 (1974) - Wilful failure to appear for a felony punishable by "hard labor" up to two years.

18. Maine Legis. Service Chap. 760, at 195-97 (approved March 27, 1974) - Failure to appear if released on felony is punishable by up to five years.

19. Ann. Code of Md., Art. 27, § 616 1/2 (c)(Cumul.Supp. 1974) - A person charged with enumerated crimes who commits a felony while released on bail or O.R. is "ineligible" to give bail "or be released on later charge" -- but can rebut ineligibility by showing (1) not a danger to the community and (2) would appear later.

    Bail Jumping Provisions: Ann. Code of Md., Art. 27 § 12B (Cumul.Supp. 1974) - Wilful failure to appear punishable up to five years (and forfeit any money bail).

20. Mass.Gen'l L.Ann., Chap. 276, § 82A (1972) - Failure to appear "without sufficient excuse" punishable not more than one year.

21. Mich.Stat.Ann. § 28-396.1 (Cumul.Supp. 1974) - Person who "absconds" when released if charged with a felony is guilty of a felony.

22. Minn.Stat.Ann. § 609.485 (as amended 1963) - A person charged with a felony "on a condition of personally appearing" who intentionally fails to appear is guilty of a felony.

23. Miss.Code 1972 Ann. § 99-5-1, 3 - Money bond.
    Bail Jumping Provisions: Miss.Code 1972 Ann. § 583-39-29 - A person guilty of "bail jumping" is guilty of a misdemeanor with penalty up to one year.

24. Vernon's Ann.Mo.Stat. § 544.455 (as amended 1972) - O.R. ("personal recognizance") release unless exercise discretion to impose enumerated conditions.
    Bail Jumping Provisions: Person wilfully failing to appear for felony punishable by up to five years imprisonment.

25. Mont. Crim'l Code of 1973, Title 94, 1947 Rev.Code Mont., Title 94 - 7-308 (1973) - Persons released on condition of appearing is guilty of a felony; punishment not to exceed ten years.

26. Rev.Stat. of Nebr. § 29-908 (Reissue of 1974) - Persons charged and released on felonies who fail to appear are guilty of felony with sentence up to three years.

27. Nev.Rev.Stat. § 178.487 (as amended 1973) - Release before trial on bail or without security (O.R.) conditioned upon the defendant's good behavior, and upon "a showing" that the defendant has committed a felony during the period of release bail "shall be revoked" after a hearing.

Bail Jumping Provisions: Nev.Rev. Stat. § 199.335 (1973) - Failure to appear when released in a felony case is a separate felony.

28. New Hamp.Crim'l Code (1973 Pamphlet), N.Hamp.Rev.Stat.Ann.Chap. 642:8 - A person failing to appear for certain felonies is guilty of a felony.

29. N.J.Stat.Ann. § 2A:104-13(a),(b) (1971) - Person failing to appear guilty of punishments up to seven years or three years depending on crime release is for [New Jersey has no "felonies" by definition - the common law determines if one of their crimes is a "felony" or not].

30. New Mexico Stat.Ann. § 41-3-8 (as amended 1973) - Failure to appear is a "Fourth Degree" felony.

31. McKinney's Consol.Laws of N.Y.Ann. § 215.57 (as amended 1968) - Persons released on bail or O.R. on a condition of appearing are guilty of a "Class E" felony if fail to appear.

32. Gen'l Stat.N.C. § 15-103.1(b)(Cumul. Supp. 1973) - Every person wilfully failing to appear or violating any condition of his release is guilty of a misdemeanor

See also Id. § 15-104.1 (1971).

33. N.Dak.Century Code § 29-08-27 (1973) - Wilful failure to appear is a misdemeanor.

34. Ohio Code Supplement § 2937.99 (as amended 1965) - Failure to appear punishable by sentence of up to five years.

35. Okla.Stat. 1971, Art. 22, § 1111 (1965) - "Jumping bail" a felony punishable up to one year.

36. Ore.Rev.Stat.,Chap. 162.205 (1971) - Bail jumping is a "Class C" felony.

37. Purdon's Pa.Stat.Ann., Rules 4013 & 4016 in Vol. 19 (as amended 1973) - Breach of a bail condition can lead to revoking bail. Failure to appear without excuse is a "third degree" felony - Purdon's Pa.Stat.Ann. Title [illegible] 5124 (as amended 1973).

38. Rhode Island - No failure to appear provisions.

39. Code Laws of S.C., § 17-300.8 (as amended 1969) - Failure to appear a felony with possible five year penalty.

40. South Dakota - Forfeiture only.

41. Tenn. Code Ann. § 39-3813 (as amended 1963) - Bail jumping is leaving state and not appearing; felony of up to five years.

42. Vernon's Texas Code Ann., Penal, § 38. 11 (1974) - If appearance is required failure to appear is a "third degree" felony.

43. Utah Code Ann. § 76-8-13 - Failure to observe appearance condition a felony.

44. Vermont - No failure to appear provisions.

45. Code of Va., § 19.1-109.7 (as amended 1963) - Failure to appear is a misdemeanor.

46. Washington - Failure to appear subject to forfeiture or revocation only.

47. West Virginia - Forfeiture only.

48. West's Wisc.Stat.Ann. § 946.49 (as amended 1970) - Bail jumping has possible punishment of up to five years.

49. Wyoming - No failure to appear penalties.

APPENDIX II

The following states, authorization to release on own recognizance was part of major revisions of state bail laws parelleling the Federal Bail Reform Act establishing release "O.R." as the presumptive form of bail:

Alaska
Arizona
Iowa
Kansas
South Carolina
Vermont
Wyoming

However, at least thirty-six state statutes authorize releasing defendants on their own recognizance, including the seven making it favored:

Alabama: Ala. Code tit. 15, § 187 (1959).
Alaska: Alaska Stat. § 12.30.020 (1970).
Arizona: Ariz. Rev. Stat. Ann. § 13-1577 (Supp. 1970).
California: Cal. Penal Code § 1318 (West 1970).
Colorado: Colo. Rev. Stat. Ann. § 37-17-12 (1966).
Connecticut: Conn. Gen. Stat. Ann. § 54-1a (Supp. 1970).
Delaware: Del. Code Ann. tit. 11, § 2104 (Supp. 1969).
Florida: Fla. Stat. Ann. § 903.03 (2) (a) 3 (Supp. 1971).
Georgia: Ga. Code Ann. § 27-911 (Supp. 1970).
Illinois: Ill. Rev. Stat. ch. 38, § 110-2 (1970).
Iowa: Iowa Code § 763.16 (Supp. 1971).

Kansas: Kan. Stat. Ann. § 22-2802 (Supp. 1970).
Louisiana: La. Rev. Stat. § 15:574.15 (1967); La. Code Crim. Pro. Ann. art. 336 (West Supp. 1971).
Maine: Me. R. Crim. P. 46 (d) (1970).
Maryland: Md. Ann. Code art. 27, § 638A (1971).
Massachusetts: Mass. Gen. Laws Ann. ch. 276, § 58 (Supp. 1971).
Michigan: Mich. Stat. Ann. § 28.872 (52) (Supp. 1971).
Minnesota: Hennepin Cty. Mun. Ct. (Crim.) R. 35.
Montana: Mont. Rev. Codes Ann. § 95-1106 (1969).
Nevada: Nev. Rev. Stat. § 178.502 (1969).
New Hampshire: N.H. Rev. Stat. Ann. § 597:1 (Supp. 1970).
New Mexico: N.M. Stat. Ann. § 36-6-6 (Supp. 1969).
New York: N.Y. Crim. Proc. Law §§ 530.10-.40 (McKinney 1970).
North Carolina: N.C. Gen. Stat. § 15-103.1 (Supp. 1969).
Ohio: Ohio Rev. Code Ann. § 2937.29 (Page Supp. 1970).
Oklahoma: Okla. Stat. Ann. tit. 59 § 1334 (1971).
Oregon: Ore. Rev. Stat. § 140.720 (1969).
South Carolina: S.C. Code Ann. § 17-300 (Supp. 1970).
Tennessee: Tenn. Code Ann. § 6-2123 (Supp. 1970).
Texas: Tex. Code Crim. Proc. art. 17. 03 (1966).
Vermont: Vt. Stat. Ann. tit. 13, § 7553a (Supp. 1970).
Virginia: Va. Code Ann. § 19.1-110 (Supp. 1970).

Washington: Wash. Rev. Code Ann. § 3.50.220 (Supp. 1970).
West Virginia: W. Va. Code Ann. § 62-1C-4 (1966).
Wisconsin: Wis. Stat. Ann. §§ 969.02, .03 (1971).
Wyoming: Wyo. R. Crim. P. 8 (c) (Supp. 1969).